

Supreme Court, U. S.

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APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1143

RAY MARSHALL, SECRETARY OF LABOR, ET AL.,
Appellants

—v.—

BARLOW'S, INC.

**ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF IDAHO**

**JURISDICTIONAL STATEMENT FILED FEBRUARY 17, 1977
PROBABLE JURISDICTION NOTED APRIL 18, 1977**

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DOCKET ENTRIES

DATE	PROCEEDINGS
1976	
Jan. 6	Complaint.
Jan. 6	Exparte Mo. for restraining order
Jan. 6	Affidavit in support of temporary restraining order
Jan. 6	Memo of points & authorities in support of pltfs application for 3 Judge panel.
Jan. 6	Issued Summons
Jan. 8	Motion for order to show Cause.
Jan. 8	Affidavit in support of mo. for temporary injunction.
Jan. 8	Certificate of Service
Jan. 8	Order to show Cause—Jan 16/76 @ 10:00 A.M. (JBA)
Jan. 15	Deft's. response to Order to show cause dated 1/8/76.
Jan. 15	Affidavit in support of preliminary injunction.
Jan. 15	Memo in support of plffs. application for a 3 judge panel & Mo. for preliminary injunction.
Jan. 16	Record of hearing; Judge Anderson to request 3 judge court on constitutional issue. Temporary rehearing order not issued. (JBA)
Jan. 16	Order denying Temporary Restraining order (JBA)
Jan. 19	Notification 2nd certificate requesting formation of 3-Judge court (JBA) cc: Runft; Westberg.
Jan. 21	Summons—all Defs. served by 1/14/76 except Def. Stender
Mar. 8	Motion and Order allowing Defs. until 3/19/76 to Answer (JBA) w/Clerk's Cert. of Mailing.

DATE	PROCEEDINGS
Mar. 19	Motion by Defs. to Dismiss for lack of subj. matter Jurisd. or in alternative, Mo. for S.J.
Mar. 19	Memo. of Defs. in support of Motion to Dismiss or for S.J.
Mar. 19	Cert. of Service by Mail cc: Judges Koelsch; McNichols; Anderson
Apr. 5	Motion of Ptff. for enlargement of time to respond
Apr. 5	Stip. re: extension of time
Apr. 5	Order allowing Ptff. until 4/12/76 to respond to Defs. Mo. to Dismiss (RM) cc: 3 Judges; 3 cc: Runft
Apr. 14	Motion for Summary Judgment by Ptff. w/Cert. of Mailing
Apr. 14	Memo. of Points & Authorities in oppo. to Defs' Motions for Dismissal and in support of Ptff's Motion for S.J.
Apr. 30	Exparte Motion & Order allowing Defs. until 5/21/76 to respond to Ptff's Mo. for S. J. (RM)
May 24	Memo. of Defs. in oppo. to Ptff's Mo. for S.J. & in reply to Ptff's oppo. to Defs' Mo. to Dismiss or for S.J. cc: to all 3 Judges
Jun. 18	Suppl. Memo of Authorities. (Ptf) CC: 3 Judges
Jun. 21	Request by Ptf. that Court take judicial notice of transcript of CIV 4-75-58. cc: 3 Judges
Jun. 25	Record of 3 Judge Hearing; Defs' Mo. to Dismiss or for S.J. and Ptff's Mo. for S.J. taken under Advisement. (RM) (JBA) (MOK)
Jul. 26	Suppl. Memo. of Authority w/attached CCM to 3 Judges
Sept. 21	Second supplemental memo of points & authority in support of plff's motion for summary judgment; cc: 3 judges

DATE	PROCEEDINGS
Oct. 29	Third Suppl. of Memo. of Points & Auth. of Ptff.
Dec. 30	Memo. Decision and Order (MOK): (JBA): (RM)
Dec. 30	Summary Judgment Granting Perm. Restraining Order against all Defs. w/ no costs of atty. fees allowed. (MOK) (JBA) (RM) cc: all 3 Judges; U.S. Atty.; Runft
1977	
Jan. 4	Notice of Appeal to the Supreme Court
Jan. 4	Certificate of Service of Notice of Appeal
Jan. 4	Motion to Suspend and Stay Enforcement of Injunction
Jan. 4	LODGED Order Granting Motion for Suspension and Stay of Injunction Pending Appeal
Jan. 5	Certificate of Service by Mail of lodged Motion & Order cc of Jan 4 & 5 filings to 3 Judges
Jan. 10	Order Denying Mo. for Stay (MOK) (JBA) (RM) w/ attached CCM cc: all 3 Judges by JBA's Secretary
Jan. 10	Memo. of Ptff. in oppo. to Mo. to suspend & Stay enforcement of Injunction. cc: all 3 Judges
Jan. 25	Order Correcting Memo. Decision (JBA) w/ CCM
Jan. 31	Supreme Court Order staying Judgment outside of Idaho c/ 3 Judges
Feb. 07	Cert. copy of Supreme Court Order Staying Idaho Dist. Court Order of 12/30/76 except as to Appellee Barlow (Justice Rehnquist)
Apr. 25	Supreme Court Order (certified copy) noting Probable Cause cc: all 3 Judges

RUNFT & LONGETEIG CHARTERED

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

Civil No. 1-76-3

BARLOW'S, INC., an Idaho corporation, PLAINTIFF

—vs—

JOHN T. DUNLOP, Secretary of Labor of the United States of America, in his official capacity; JOHN H. STENDER, Assistant Secretary of Labor for Occupational Safety and Health, in his official capacity; JAMES W. LAKE, Assistant Regional Director, Occupational Safety and Health Administration, in his official capacity; and RICHARD C. JACKSON, Area Director, Occupational Safety and Health Administration, in his official capacity, DEFENDANTS

COMPLAINT

COMES NOW the plaintiff and for a cause of action against the defendants, complains and alleges as follows:

I.

This Court has original jurisdiction of this action, and the plaintiffs bring this action, under and pursuant to 28 U.S.C. Section 1337. Based on this jurisdiction, temporary and permanent injunctory relief is sought by plaintiff pursuant to 28 U.S.C. Sections 2282 and 2284 to restrain the enforcement, operation and/or execution of the Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. Section 651, et seq., as applied to plaintiff herein.

II.

Plaintiff is an Idaho corporation in good standing under and pursuant to the laws of the State of Idaho, with its principal place of business located at 225 West Pine Street, Pocatello, Idaho.

III.

The defendant JOHN T. DUNLOP is the duly appointed, qualified and acting Secretary of Labor of the United States of America, and as such, administers and directs the Occupational Safety and Health Administration of the United States Department of Labor under and pursuant to the provisions of the Occupational Safety and Health Act of 1970, as amended, hereinafter referred to as "the Act", and under and pursuant to rules and regulations promulgated pursuant to the Act.

IV.

The defendant JOHN H. STENDER is the Assistant Secretary of the United States Department of Labor for Occupational Safety and Health, and as such, is the chief administrator under the Secretary of Labor, responsible for the enforcement, operation and/or execution of the Act and rules and regulations promulgated pursuant thereto.

V.

The defendant JAMES W. LAKE is the Regional Director of the United States Department of Labor Occupational Safety and Health Administration, hereinafter referred to as "OSHA", for Federal Region 10 comprising the states of Washington, Oregon, Idaho and Alaska.

VI.

The defendant RICHARD C. JACKSON is the Area Director of OSHA for Southern Idaho, and in that capacity directs the day to day administration of OSHA in Southern Idaho, including Pocatello, Idaho.

VII.

This action is brought against the aforementioned defendants in their respective official capacities, including any of their respective predecessors, successors and agents.

VIII.

The facts and legal issues involved in this action conform to the requirements set forth in 28 U.S.C. Sections 2282 and 2284 for the convening of a District Court of three judges to adjudicate this matter.

IX.

As set forth in 29 U.S.C. Section 651, Congress declared that the Act was enacted and promulgated "through the exercise of its powers to regulate commerce among the several states . . .". 29 U.S.C. Section 657 purports to authorize the Secretary of Labor and his agents to enter any factory, plant, business, or other place of employment without delay and conduct a general search and inspection of all materials, equipment, and records therein without first obtaining a search warrant.

X.

On September 11, 1975, an agent of defendants was denied permission by plaintiff to conduct a routine OSHA search and inspection of plaintiff's business premises. At this time defendants' agent advised plaintiff's president, Ferrol G. "Bill" Barlow, of the provisions of 29 U.S.C. Section 657, and he further advised Mr. Barlow that he was there to conduct such a search and investigation as so provided by the Act. Defendants' agent also advised Mr. Barlow that he had received no complaints regarding the health or safety conditions of plaintiff's business premises, and that he possessed no information giving him probable cause to believe that any violations of the Act existed upon or were occurring within plaintiff's said business premises. Plaintiff, through Mr. Barlow, denied defendants' agent permission to enter plaintiff's business premises at that time. Concurrently there-

with, plaintiff, through Mr. Barlow, advised defendants' agent that the denial of entry was based solely on constitutional grounds and that no entry into plaintiff's premises would be allowed for the reason that defendants' agent did not have a search warrant.

XI.

At an Order to Show Cause Hearing on December 30, 1975, in the matter of Establishment Inspection of: Barlow's, Inc., 225 West Pine, Pocatello, Idaho, Civil No. 4-75-58, the United States District Court entered an order authorizing and directing defendants to conduct an "inspection and investigation" upon plaintiff's business premises forthwith pursuant to the provisions of 29 U.S.C. § 657 and the regulations promulgated pursuant thereto at 29 C.F.R. part 1903, and further ordering that Barlow's, Inc., its agents, and employees are enjoined and restrained from interfering therewith. A form of this order so entered by the District Court on December 30, 1975, is attached hereto for reference as Exhibit "A".

XII.

Under the factual circumstances of this case the imminent application and enforcement by defendants of the provisions of 29 U.S.C. § 657 and the regulations at 29 C.F.R. part 1903 operate to place plaintiff in imminent danger of violation and deprivation of certain of its constitutional rights:

- (1) Such application and enforcement of the Act and regulations will deprive plaintiff, a non-public business, of its right of privacy in violation of the provisions of the Fourth and Fifth Amendments to the United States Constitution;
- (2) Such application and enforcement of the Act and regulations will violate plaintiff's right to be secure against unreasonable searches and seizures guaranteed by the Fourth Amendment to the United States Constitution;

(3) Such application and enforcement of the Act and regulations without probable cause to believe, sufficient to support a warrant, that the purposes and standards of the Act are being violated on plaintiff's premises will violate plaintiff's right to due process of law in violation of the Fifth Amendment to the United States Constitution.

XIII.

The threat to plaintiff's constitutional rights is imminent, substantial and irreparable, since, if not immediately enjoined, defendants, pursuant to court order, shall forthwith violate plaintiff's constitutional rights by making an unwarranted, unreasonable entry onto plaintiff's premises, which entry plaintiff and its agents can prohibit only on pain of contempt of court. Defendants and their agents should be immediately restrained, and temporarily and permanently enjoined from making the imminent warrantless search and inspection of plaintiff's premises.

XIV.

The Act and regulations promulgated pursuant thereto constitute a violation of the doctrine of separation of powers between the legislative branch and the judicial branch as set forth in Article I and Article III of the United States Constitution. By this Act and the regulations, Congress has unconstitutionally usurped the power of the judiciary by legislating probable cause. Due process of law is violated whenever probable cause is not determined in each separate case or controversy, as in judicial determination thereof.

XV.

It has been necessary for plaintiff to obtain legal services, and plaintiff has engaged the law firm of Runft & Longeteig, Chartered, to maintain this action on its behalf. In the event that plaintiff should prevail in this action against defendants, then plaintiff is entitled to an award of reasonable attorneys' fees.

WHEREFORE, plaintiff prays as follows:

1. That this Court immediately enter a temporary restraining order prohibiting defendants from applying, enforcing or executing the Act and the regulations promulgated pursuant thereto, or any portion of the Act or regulations, against plaintiff;

2. That, pending final adjudication of this matter, a temporary injunction be entered enjoining and restraining the application, enforcement, operation or execution of this Act and the regulations promulgated pursuant thereto, or any part of the Act or said regulations, against plaintiff;

3. That a permanent injunction restraining and enjoining the application, enforcement, operation and execution of the Act and the regulations promulgated pursuant thereto, or any portion of the Act or said regulations, against the plaintiff;

4. That this Court take jurisdiction of this cause of action and convene a District Court of three judges to adjudicate this cause of action pursuant to 28 U.S.C. §§ 2282 and 2284;

5. That jurisdiction be taken of this matter by a three judge District Court and that such Court be empaneled to hear and determine this case, accordingly;

6. That plaintiff be awarded its attorneys' fees and costs reasonably incurred in this lawsuit;

7. That plaintiff be granted such other and further relief as the proper Court may deem just.

Dated this 6th day of January, 1976.

RUNFT & LONGETEIG, CHARTERED

By /s/ John L. Runft
JOHN L. RUNFT, of the Firm
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true and correct copy of the foregoing COMPLAINT on MARION J. CALLISTER, UNITED STATES ATTORNEY, District of Idaho, by delivering same to Room 698, Federal Building, 550 West Fort Street, Boise, Idaho 83724, this 6th day of January, 1976.

/s/ John L. Runft
JOHN L. RUNFT

RUNFT & LONGETEIG CHARTERED
ATTORNEYS AND COUNSELORS AT LAW
P.O. Box 953
420 West Bannock Street
Boise, Idaho 83701
Telephone (208) 345-6521

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 1-76-3

BARLOW'S, INC., an Idaho corporation, PLAINTIFF

vs.

JOHN T. DUNLOP, Secretary of Labor of the United States of America, in his official capacity; JOHN H. STENDER, Assistant Secretary of Labor for Occupational Safety and Health, in his official capacity; JAMES W. LAKE, Assistant Regional Director, Occupational Safety and Health Administration, in his official capacity; and RICHARD C. JACKSON, Area Director, Occupational Safety and Health Administration, in his official capacity, DEFENDANTS

EX PARTE MOTION FOR RESTRAINING ORDER

COMES NOW Plaintiff and moves this honorable Court for a Temporary Restraining Order enjoining and restraining defendants and their agents and employees from enforcing the provisions of 29 U.S.C. § 657 and the pertinent regulations promulgated pursuant thereto at 29 C.F.R. part 1903, on the grounds and for the reasons that plaintiff is in imminent danger of having its constitutional rights of due process, privacy, and security from unreasonable search and seizure irrevocably violated. Whereas plaintiff is in imminent jeopardy of having its constitutional rights violated, there is no urgent reason demanding immediate application and enforcement of the Act and regulations by defendants, as can be

readily seen from the delay in bringing the Order to Show Cause proceedings following the inspection. On the other hand, each time constitutional rights are violated, such violation is irreparable—even though perhaps not compensatory in great sums for actual damages.

Plaintiff further moves this honorable Court that defendants be so restrained until a hearing on plaintiff's motion for temporary injunction can be determined by the full court of three judges.

This motion is based upon the complaint on file herein and the affidavit of attorney John L. Runft filed herein in support hereof.

Dated this 6th day of January, 1976.

RUNFT & LONGETEIG, CHARTERED

By /s/ John L. Runft
JOHN L. RUNFT, of the Firm

RUNFT & LONGETEIG CHARTERED
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IN THE UNITED STATES DISTRICT COURT
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AFFIDAVIT IN SUPPORT OF TEMPORARY RESTRAINING ORDER

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

JOHN L. RUNFT, being first duly sworn on oath, deposes and says:

1. Your affiant is a member of the firm of Runft & Longeteig, Chartered, and is one of the attorneys personally involved in prosecuting the subject case. Your affiant has been in frequent telephonic contact with plaintiff's president, Mr. Ferrol G. "Bill" Barlow and has reviewed the facts of this matter with him in considerable detail.

2. Your affiant is informed and believes that on September 11, 1975, OSHA Compliance Officer, T. Daniel Sanger under orders from his Area Director, Mr. Richard Jackson, went to plaintiff's place of business at about 11:00 o'clock a.m. of that day. Your affiant is informed and believes that the purpose of Mr. Sanger's visit to plaintiff's place of business at 225 West Pine Street, Pocatello, Idaho, was to conduct a search and inspection pursuant to 29 U.S.C. § 657, all as is set forth in Mr. Sanger's affidavit, a copy of which is attached hereto and by this reference made a part hereof, except to the extent it disagrees with the facts set forth herein.

3. Your affiant is informed and believes that Mr. Sanger was met upon his arrival at plaintiff's business premises by Mr. Ferrol G. "Bill" Barlow, who was the president and owner of plaintiff. Mr. Sanger presented his OSHA credentials to Mr. Barlow and requested permission to enter the business premises of plaintiff. Mr. Sanger advised Mr. Barlow of the purpose and authority for his visit, however, Mr. Barlow denied him permission to enter plaintiff's premises at that time.

4. Your affiant is informed and believes that Mr. Barlow inquired of Mr. Sanger as to whether he had any complaint or other "probable cause" to believe that there was any violation of OSHA standards in plaintiff's premises; that Mr. Sanger replied that he had not received any such complaints and had no such information as to any specific violations in plaintiff's place of business; that Mr. Barlow thereupon advised Mr. Sanger that he was denying Mr. Sanger entry into the premises of the plaintiff for the reason that Mr. Sanger did not possess a search warrant and that he, Mr. Barlow, was exercising his constitutional rights in prohibiting such warrantless entry. Mr. Barlow did inform Mr. Sanger that a search warrant would be honored.

5. Your affiant is informed and believes that plaintiff is engaged in the business of metal fabrication and that a foundry is located upon the premises; that plaintiff deals in certain hardware goods, such as mirrors, plumbing fixtures and other household hardware items.

6. The firm of Runft & Longeteig, Chartered, was retained by plaintiff on or about December 23, 1975. Your affiant attended a show cause hearing on behalf of plaintiff in the matter of Establishment Inspection of: Barlow's, Inc., 225 West Pine Street, Pocatello, Idaho, Civil No. 4-75-58, on December 30, 1975, at 3:00 o'clock p.m. before the United States District Court in Boise, Idaho. At the conclusion of this Order To Show Cause Hearing, the Court ordered and directed defendants to conduct a search and investigation as provided by 29 U.S.C. § 657 and applicable regulations within five working days from the date of the order and restrained and enjoined plaintiff, its agents and employees from interfering with such inspection and investigation so authorized by the Court's order.

7. Your affiant is informed and believes that unless defendants are immediately restrained from applying and enforcing the provisions of 29 U.S.C. § 657 and the relevant regulations, plaintiff's rights to security from search, right of privacy and right to due process will be violated unless plaintiff chooses to attempt to defend these rights by means of risking contempt of court.

Dated this 6th day of January, 1976.

/s/ John L. Runft
JOHN L. RUNFT

SUBSCRIBED AND SWORN TO before me this 6th day of January, 1976.

/s/ Norma J. Hunt
Notary Public for Idaho
Residing at Boise, Idaho.

MARION J. CALLISTER
 UNITED STATES ATTORNEY
 DISTRICT OF IDAHO
 Room 693, Federal Building, Box 037
 550 West Fort Street
 Boise, Idaho 83724
 Telephone—342-2711, Ex. 2211

UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF IDAHO

Civil No. 4 75 58

IN THE MATTER OF
 ESTABLISHMENT INSPECTION OF:

BARLOW'S INC.
 225 West Pine
 Pocatello, Idaho

COUNTY OF BANNOCK)
) ss.
 STATE OF IDAHO)

AFFIDAVIT OF T. DANIEL SANGER

T. Daniel Sanger, being duly sworn, hereby deposes, states and says as follows:

1. That affiant is a Compliance Officer and representative of the Occupational Safety and Health Administration, United States Department of Labor, under the direct supervision of Mr. Richard Jackson, Area Director, Boise, Idaho, office.

2. That on or about September 11, 1975, at approximately 11:00 a.m., I arrived at the business premises known as Barlow's Inc., 225 West Pine, Pocatello, Idaho. The purpose of my visit to this place of business was to conduct a safety and health inspection pursuant to Section 8(a) of the Occupational Safety and Health Act of 1970 (hereinafter referred to as the Act). Present at my

arrival was Mr. Bob Barlow, believed to be the President and Owner of Barlow's Inc. I presented to Mr. Bob Barlow appropriate credentials which designated me as a representative of the Occupational Safety and Health Administration, U.S. Department of Labor. I then requested that Mr. Barlow permit me to enter the company worksite located at 225 West Pine, Pocatello, Idaho, to conduct the aforesaid inspection and advised Mr. Barlow of the pertinent provisions of Section 8(a) of the Act which contain the statutory authority for the making of such inspection. I was denied permission to enter those premises by Mr. Barlow at that time. Said denial of entry was not refused by him by reason of any alleged unreasonableness in time, limit, manner, or any other basis provided for in the Act. Instead, I was advised by Mr. Barlow that my entry was denied because I did not possess a Warrant and that it was his right as a citizen to due process and that a Warrant was necessary before he would permit me to make the inspection.

3. That from my personal observation of the said business premises and my conversation with Mr. Barlow on September 11, 1975, I state that on September 11, 1975, the nature of the business is believed by me to have been sheet metal fabrication shop and some limited hardware goods, such as mirrors, plumbing fixtures and household hardware items; that the business utilized sheet metal which is produced only by means of a steel rolling mill; and that the business employed approximately 15 persons. From my own knowledge, I know that there are no steel rolling mills situated within the State of Idaho.

Dated this 3 day of December, 1975.

/s/ T. Daniel Sanger
T. DANIEL SANGER
Compliance Officer
Occupational Safety and
Health Adm.
U.S. Department of Labor—
Room B-17
Federal Building &
U.S. Courthouse
150 South Arthur
Pocatello, Idaho 83201

Subscribed and sworn to before me this 3 day of December, 1975.

/s/ [Illegible]
Notary Public
Residing at Pocatello Idaho
My commission expires on
3 July 78

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 1 76 3

[Filed Jan. 8, 1976]

BARLOW'S, INC., an Idaho corporation, PLAINTIFF

vs.

JOHN T. DUNLOP, Secretary of Labor of the United States of America, in his official capacity; JOHN H. STENDER, Assistant Secretary of Labor for Occupational Safety and Health, in his official capacity; JAMES W. LAKE, Assistant Regional Director, Occupational Safety and Health Administration, in his official capacity; and RICHARD C. JACKSON, Area Director, Occupational Safety and Health Administration, in his official capacity, DEFENDANTS

MOTION FOR ORDER TO SHOW CAUSE

COMES NOW the plaintiff pursuant to 28 U.S.C. §§ 2282 and 2284 and Rule 65 of the Federal Rules of Civil Procedure, and moves this Honorable Court for an order directed to defendants to show cause why a three judge district court pursuant to 28 U.S.C. §§ 2282 and 2284, should not be convened in this matter and to show cause why defendants and their agents should not be temporarily and until trial on the merits or other disposition of this matter by a three judge district court, enjoined and restrained from enforcing the provisions of 29 U.S.C. § 657, the pertinent regulations promulgated pursuant thereto at 29 C.F.R. part 1903, and from en-

forcing this Court's Order in the matter of Establishment Inspection of Barlow's, Inc., 225 West Pine, Pocatello, Idaho, Civil No. 4-75-58, entered on December 31, 1975, which Order was granted pursuant to said aforementioned law and regulations, and which Order authorized and directs an OSHA search and inspection of plaintiff's business premises and restrains plaintiff from preventing or interfering with said search and inspection.

This Motion is brought upon the grounds and for the reasons that plaintiff's constitutional rights to privacy, due process and to be free from unreasonable search and seizure will be irrevocably and irreparably violated by the search and inspection of plaintiff's premises ordered by the Court in Civil No. 4-75-58 and by other similar application of 29 U.S.C. § 657 and pertinent regulations. This Motion is based upon pleadings on file herein, and upon the affidavit of plaintiff's counsel, and Memorandum of Points and Authorities in Support of Plaintiff's Application for Three Judge District Court Panel, all of which were filed herein on January 6, 1976.

DATED: This 7th day of January, 1976.

RUNFT & LONGETEIG, CHARTERED

By /s/ John L. Runft
JOHN L. RUNFT, of the Firm
Attorneys for Plaintiff

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 1-76-3

[Filed Jan. 16, 1976]

BARLOW'S, INC., an Idaho Corporation, PLAINTIFF

vs.

JOHN T. DUNLOP, Secretary of Labor of the United States
of America, in his official capacity; et al., DEFENDANTS

ORDER

This matter having come before the Court upon this Court's Order to Show Cause entered on January 8, 1976, directing the Defendants to show cause why a Three Judge District Court panel should not be convened and why a temporary injunction should not be ordered in the premises, and the Court having taken judicial notice of the case *In The Matter of Establishment Inspection of Barlow's Inc.*, 225 West Pine, Pocatello, Idaho, Civil No. 4-75-58, in the United States District Court for the District of Idaho, and a hearing having been held pursuant to that Order on January 15, 1976, before this Court whereat the Plaintiff was represented by Mr. John L. Runft of the firm Runft and Longeteig, Chartered, Boise, Idaho, and the Defendants were represented by Paul L. Westberg, Assistant United States Attorney for the District of Idaho, Boise, Idaho, and the Court being fully advised in the premises, it hereby:

ORDERS, ADJUDGES AND DECREES that the Plaintiff has sufficiently shown that substantial ground for believing that the Occupational Safety and Health Act of 1970 is repugnant to the Constitution of the United States and that, therefore, this District Judge will forthwith request that the Chief Judge of the Ninth Circuit Court of Appeals shall empanel a three-judge court to hear and determine this action. The Court relies upon the case *See v. Seattle*, 387 U.S. 541 (1967), and in particular parts 1, 3, and 4 of the majority opinion therein in finding such sufficient showing in the instant case.

It is further ordered, adjudged and decreed that the Plaintiff's Motion for a Preliminary Injunction, amended to become a Motion for Temporary Restraining Order, be denied because it is not manifestly apparent to this Court that the Plaintiff is likely to prevail upon the merits of the case and that, further, the Plaintiff has failed to make an adequate showing of immediate and irreparable injury should the temporary restraining order not be issued. In this regard, the Court relies upon the expectation that the Department of Labor and Department of Justice will be reluctant to pursue contempt proceedings against the Plaintiff in Civil No. 4-75-58 mentioned above.

Dated this 16th day of January, 1976.

/s/ J. Blaine Anderson
Judge, U.S. District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 1-76-3

[Filed Jan. 19, 1976]

BARLOW'S, INC., an Idaho corporation, PLAINTIFF

vs.

JOHN T. DUNLOP, Secretary of Labor of the United States of America, in his official capacity; JOHN H. STENDER, Assistant Secretary of Labor for Occupational Safety and Health, in his official capacity; JAMES W. LAKE, Assistant Regional Director, Occupational Safety and Health Administration, in his official capacity; and RICHARD C. JACKSON, Area Director, Occupational Safety and Health Administration, in his official capacity, DEFENDANTS

NOTIFICATION AND CERTIFICATE

TO: THE HONORABLE RICHARD H. CHAMBERS,
CHIEF JUDGE, COURT OF APPEALS
FOR THE NINTH CIRCUIT

Pursuant to the provisions of 28 U.S.C. § 2284, you are notified that the complaint now pending in the above cause challenges the constitutionality of the Occupational Safety and Health Act, Public Law 91-596, particularly 29 U.S.C. § 657. Injunctive relief is sought.

I certify that I have examined the complaint, the affidavits and the briefs and have considered oral argument of counsel, and that, in my opinion, this challenge requires the formation of a district court of three judges composed as designated in the above-mentioned statutory provisions.

January 16, 1976

/s/ J. Blaine Anderson
J. BLAINE ANDERSON
Judge, United States District Court

RUNFT & LONGETEIG CHARTERED
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. CIV 1-76-3

[Received Jan. 15, 1976]

BARLOW'S, INC., an Idaho corporation, PLAINTIFF

vs.

JOHN T. DUNLOP, Secretary of Labor of the United States of America, in his official capacity; JOHN H. STENDER, Assistant Secretary of Labor for Occupational Safety and Health, in his official capacity; JAMES W. LAKE, Assistant Regional Director, Occupational Safety and Health Administration, in his official capacity; and RICHARD C. JACKSON, Area Director, Occupational Safety and Health Administration, in his official capacity, DEFENDANTS

AFFIDAVIT IN SUPPORT OF PRELIMINARY INJUNCTION

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

FERROL G. "BILL" BARLOW, being first duly sworn on oath, deposes and says:

1. I am the president and active manager of Barlow's, Inc., an Idaho corporation in good standing, whose principal place of business is located at 225 West Pine Street, Pocatello, Idaho 83201.

2. Barlow's, Inc., has been in the business of installing electrical wiring and fixtures, plumbing and fixtures, and

heating and air conditioning equipment for approximately seventeen years. The amount of our business in each area is divided approximately equally.

3. Barlow's, Inc., deals almost exclusively with customers in the vicinity of Pocatello, Idaho. The sheet metal which the corporation uses in fabricating heating and air conditioning ductwork is produced without the State of Idaho.

4. Barlow's, Inc., is licensed by the State of Idaho with regard to its business in the field of electrical and plumbing installations and by the City of Pocatello as a business conducted within that city. Barlow's, Inc., is not licensed by the United States or any agency thereof, and it is not regulated in any way by the United States or any agency thereof other than in common with all other enterprises engaged in interstate commerce.

5. On September 11, 1975, at approximately 11:00 a.m., one T. Daniel Sanger approached me as I was standing at the customer service counter at Barlow's, Inc.'s, place of business. Mr. Sanger identified himself as a Compliance Officer for the Occupational Safety and Health Administration. After conducting an initial interview with me he stated that he was now ready to conduct a general inspection of the non-public portion of the plant which is completely closed off by partitions from the public and customer service area which is open to the public. I inquired as to whether he had a search warrant and denied him the right to make an inspection of the non-public area of the premises upon learning that he did not have such a warrant. He asked why we refused to allow the inspection, and I stated that the Fourth Amendment required that a warrant be obtained. After concluding a collect telephone call and stating that we would see each other again, he left.

6. I am not aware of any complaints by any of the employees of Barlow's, Inc., concerning the safety of the equipment used by Barlow's, Inc., nor do I believe the firm to be in violation of any safety and health standards. When I inquired of Mr. Sanger as to the reason for the inspection, he stated that there were no complaints, and the name of the firm had simply come up at

this time. While I do not recall the exact words of the conversation, it is my impression that Mr. Sanger proposed to make a simple, routine inspection.

7. On or about December 17, 1975, I was served with the Order to Show Cause filed in the United States District Court for the District of Idaho in Civil case no. CIV 4 75 58. On December 30, 1975, the Honorable Fred M. Taylor, Judge of the United States District Court, entered an order in the above mentioned case which required our firm to allow inspection of the corporation's business premises in accordance with the provisions of the Occupational Safety and Health Act of 1970. On January 5, 1976, the above mentioned T. Daniel Sanger once more appeared upon our business premises, served me with the above mentioned order, and demanded that he be allowed to make his general inspection in accordance with the terms of the order. At that time I respectfully declined to allow such inspection upon the grounds of the rights guaranteed by the Fourth Amendment.

DATED: This 8 day of January, 1976.

FERROL G. "BILL" BARLOW

SUBSCRIBED AND SWORN TO before this 8 day of January, 1976.

Notary Public for Idaho
Residing at Boise, Idaho

MARION J. CALLISTER
UNITED STATES ATTORNEY
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WILLIAM J. KILBERG
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 1-76-3

(three-judge court)

[Filed Mar. 19, 1976]

BARLOW'S, INC., an Idaho Corporation, PLAINTIFF

v.

W. J. USERY, Secretary of Labor of the United States
of America, in his official capacity, et al., DEFENDANTS

DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT
MATTER JURISDICTION, OR, IN THE ALTERNATIVE, FOR
SUMMARY JUDGMENT

Defendants, the Secretary of Labor et al., move the Court to dismiss the complaint since the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.) provides exclusive forums in which to raise objections to

OSHA inspections and this court is accordingly without subject matter jurisdiction to rule on such objections which form the sole basis for petitioner's complaint. Alternatively, since the prior order of this Court granting the Secretary's petition for entry, inspection and investigation, and rejecting identical constitutional objections, was a final decision on the merits from which petitioner never appealed, the complaint should be dismissed under the doctrine of *res judicata* because it seeks to relitigate the same issues. Fed. R. Civ. P. 12(b)(6). Finally, if the complaint is properly before the Court, summary judgment should be granted the Secretary since the facts are undisputed and the Act's inspection procedures are constitutional. F.R. Civ. P. 56(b).

WHEREFORE, defendants respectfully request the instant complaint be dismissed, or, in the alternative, that summary judgment be granted in their favor.

Respectfully submitted,

MARION J. CALLISTER
United States Attorney

By

PAUL L. WESTBERG
Assistant United States Attorney

WILLIAM J. KILBERG
Solicitor of Labor

BENJAMIN W. MINTZ
*Associate Solicitor for
Occupational Safety and Health*

MICHAEL H. LEVIN
Counsel for Appellate Litigation

ALLEN H. FELDMAN
*Assistant Counsel for Appellate
Litigation*

/s/ Marc R. Hillson
MARC R. HILLSON
Attorney

U.S. DEPARTMENT OF LABOR
Washington, D.C. 20210
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MARCH 1976

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 ATTORNEYS & COUNSELORS AT LAW
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 420 West Bannock Street
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 Telephone (208) 345-6521
 Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF IDAHO

Civil No. 1-76-3

(Three-Judge-Court)

[Received Apr. 15, 1976]

BARLOW', INC., an Idaho corporation, PLAINTIFF

—vs—

W. J. USERY, Secretary of Labor of the United States of
 America, in his official capacity, et al., DEFENDANTS

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, by its attorneys and pursuant to Rule 56 of the Federal Rules of Civil Procedure, moves this court to enter summary judgment for the Plaintiff on the ground that there is no genuine issue as to any material fact and the Plaintiff is entitled to judgment as a matter of law.

In support of this motion, Plaintiff refers to the record herein including the Complaint; the Affidavits of Mr. Ferrol G. "Bill" Barlow and Mr. T. Daniel Sanger; Plaintiff's Memorandum of Points & Authorities in Opposition to Defendants' Motions for Dismissal and in Support of Plaintiff's Motion for Summary Judgment; and oral argument.

DATED: April 14, 1976.

RUNFT & LONGETEIG CHARTERED

By _____
 JOHN L. RUNFT, of the firm

By _____
 DAVID J. STECHER, of the Firm
 Attorneys for Plaintiff

CERTIFICATE OF MAILING

I HEREBY CERTIFY that service of the within and foregoing PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, together with MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTIONS FOR DISMISSAL AND IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, was made this 14th day of April, 1976, by mailing a copy thereof to Mr. Marion J. Callister, United States Attorney, Federal Building, 550 West Fort Street, Boise, Idaho 83724.

 DAVID J. STECHER

WILBUR T. NELSON
 UNITED STATES ATTORNEY
 District of Idaho
 Federal Building, Room 693
 550 West Fort Street
 Boise, Idaho 83724
 Telephone: 384-1211

UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF IDAHO

Civil No. 1-76-3

(Three-Judge Court)

[Filed Jan. 4, 1977]

BARLOW'S, INC., an Idaho corporation, PLAINTIFF,

vs.

W. J. USERY, Secretary of Labor of the United States
 of America, in his official capacity, et al., DEFENDANTS.

MOTION TO SUSPEND AND STAY
 ENFORCEMENT OF INJUNCTION

COME NOW the Defendants by and through the United States Attorney for the District of Idaho and hereby move the Court, pursuant to Rule 62 of the Federal Rules of Civil Procedure, to suspend and stay enforcement of the injunction against the Defendants granted in the Court's Memorandum Decision and Order and Summary Judgment entered on December 30, 1976, in the above-captioned case, pending disposition of this matter on appeal to the United States Supreme Court upon the grounds and for the reasons that:

1. By said Memorandum Decision and Order and Summary Judgment received by the Defendants on January 3, 1977, the Court expressly held Section 8(a) of the Occupational Safety and Health Act, 29 U.S.C. 657(a), unconstitutional, and enjoined the Defendants from acting or attempting to act pursuant to or in furtherance of that section.

2. On January 4, 1977, the Defendants pursuant to 28 U.S.C. 1252 and 1253 filed a Notice of Appeal directly to the United States Supreme Court from the Court's Memorandum Decision and Order and Summary Judgment entered on December 30, 1976.

3. Disposition of the appeal by the Supreme Court will at minimum take several months. If during that time this Court does not suspend and stay its Memorandum Decision and Order and Summary Judgment, there is no question that the Defendants and the public and affected employees will be irreparably damaged. The inspection and investigation provision struck down by the Court is at the heart of the Act. For it is only "upon inspection or investigation" that the Secretary may issue citations requiring employer abatement of violations of duly-promulgated standards or the general duty clause requiring that "[e]ach employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. 658(a), 654(a). Thus, to the extent Section 8(a) has been made inoperable by the Judgment and Order of this Court the Secretary is almost totally powerless to require employers to remedy hazardous conditions which endanger the safety and health of employees. Considering the vast scale of the act such paralysis of inspections and the enforcement scheme they trigger will have devastating effects on the employees for whose benefit the Act was passed.

4. One other District Court has flatly rejected the constitutional attack accepted here, while two other three-judge courts considering the same issue have refused to strike down Section 8(a). Instead they have simply interpreted the statute to preclude warrantless non-consensual inspections by the Secretary, a result whose effect on the government's ability to enforce is less severe. Accordingly, there is a strong possibility that even if the Supreme Court ultimately disagrees with the Secretary's position, it will not take the road taken here but will construe the statute consistent with the Fourth Amendment. Thus, there is strong ground for believing the Secretary

will suffer irreparable injury if the Court's Judgment and Order are not stayed, even in the event he loses his appeal.

5. Finally, the Court has effectively enjoined enforcement of a major federal regulatory statute as repugnant to the Constitution. To state that result is itself to justify a stay, the purpose of which has traditionally been to preserve the *status quo* pending final disposition, not irretrievably reverse it so far as workers injured in the interim are concerned. See, e.g., *St. Pierre v. U.S.*, 319 U.S. 41, 42-43 (1943). When the purpose of the statutory three-judge court procedure—to prevent such injury to governmental interests by providing an expedited route for final resolutions as swiftly as possible, see *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 154-155 (1963)—is considered in addition, a stay *pendente lite* is even more forcefully warranted. An opposite result would treat this Court's Order as final to the detriment of innumerable employees, despite the issues imminent resolution by the Supreme Court.

WHEREFORE, Defendants move this Court to stay its Memorandum Decision and Order and Summary Judgment entered on December 30, 1976, pending disposition of the direct appeal to the United States Supreme Court.

Respectfully submitted.

WILBER T. NELSON
United States Attorney

By /s/ Paul L. Westberg
PAUL L. WESTBERG
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 1-76-3

(Three-Judge Court)

[Received & Filed Jan. 10, 1977]

BARLOW'S, INC., an Idaho corporation, PLAINTIFF,

vs.

W. J. USERY, Secretary of Labor of the United States of America, in his official capacity, et al., DEFENDANTS.

ORDER DENYING MOTION FOR STAY

The defendants' motion for stay pending appeal pursuant to Rule 62(c), Fed. Rules of Civil Proc., and plaintiff's opposition thereto have been received and considered by the three judges assigned to hear the cause in this court. No hearing is deemed necessary since all judges concur. The defendants' showing as to irreparable harm and other essential elements usually invoked to justify the granting of a stay or suspension of enforcement are conclusory and insufficient. The decision of this court does not strike down or dismantle the whole statutory scheme. Only one section of the Act is affected. Accordingly,

IT IS ORDERED HEREBY that the motion to stay and suspend the operation and enforcement of the judgment and decree of December 30, 1976, is DENIED.

DATED this 10th day of January, 1977.

/s/ M. Oliver Koelsch
M. OLIVER KOELSCH
Senior Circuit Judge

/s/ J. Blaine Anderson
J. BLAINE ANDERSON
Circuit Judge

/s/ Ray McNichols
RAY MCNICHOLS
Chief District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 1-76-3

(Three-Judge Court)

[Received & Filed Jan. 27, 1977]

BARLOW'S, INC., an Idaho corporation, PLAINTIFF,

vs.

W. J. USERY, Secretary of Labor of the United States
of America, in his official capacity, et al., DEFENDANTS.

ORDER CORRECTING MEMORANDUM DECISION

It has been brought to the attention of the court in this cause that an error appears on page 2 under Part I of the Memorandum Decision and Order filed herein on December 30, 1976, and that the interests of clarity and accuracy require a correction. Accordingly,

IT IS ORDERED HEREBY that the word "Administration" appearing in the fourth line from the bottom of page 2 of the typewritten Memorandum Decision and Order of December 30, 1976, is deleted and in lieu thereof the following is inserted, "Review Commission (29 U.S.C. § 661," so that the passage shall read (lines 4 and 5 from bottom) "—the Occupational Safety and Health Review Commission (29 U.S.C. § 661), and, second, that plaintiff. . .".

DATED this 25th day of January, 1977.

FOR THE COURT:

/s/ J. Blaine Anderson
J. BLAINE ANDERSON

United States Circuit Judge

SUPREME COURT OF THE UNITED STATES

No. A-600

ALFRED G. ALBERT, ACTING SECRETARY OF LABOR, ET AL.,
APPELLANTS

v.

BARLOW'S, INC.

ORDER

UPON CONSIDERATION of the application of the Acting Solicitor General for a stay of the judgment of the United States District Court for the District of Idaho in this case,

IT IS ORDERED that the judgment of that court entered December 30, 1976, be, and the same is hereby, stayed insofar as it purports to restrain the conduct of applicant outside the District of Idaho, pending receipt of a response from respondent and further order of the Circuit Justice or of the Court.

/s/ William H. Rehnquist
Associate Justice of the
Supreme Court of the
United States

Dated this 25 day of January, 1977

SUPREME COURT OF THE UNITED STATES

 No. A-600

RAY MARSHALL, SECRETARY OF LABOR, APPLICANT

v.

BARLOW'S, INC.

ON APPLICATION FOR STAY

[February 3, 1977]

MR. JUSTICE REHNQUIST, Circuit Justice.

The Solicitor General, on behalf of the Secretary of Labor, applies for a partial stay of an injunction issued by a three-judge District Court in the District of Idaho. That court held that § 8(a) of the Occupational Health and Safety Act, 29 U. S. C. § 657(a), allowing warrantless entry and inspection of work places for OSHA violations, is in conflict with the Fourth Amendment of the United States Constitution, and enjoined further searches by the Secretary's representative pursuant to that section. The Government does not seek a stay of the order insofar as it protects the respondent from future searches, but only as it protects persons not party to this suit. On January 25, 1977, I granted a stay of the order to the extent that the order restrains the applicant's conduct outside of the District of Idaho.

Upon consideration of the response subsequently filed, I now grant in full the Government's request for a stay of the three-judge court order as it affects persons other than the respondent. On the merits of the Fourth Amendment question, the District Court relied on our decisions in *Camara v. Municipal Court*, 387 U.S. 523 (1967), and *See v. Seattle*, 387 U.S. 541 (1967). The Government relies on our decisions in *Colonnade Catering Corp. v.*

United States, 397 U. S. 72 (1970) and *United States v. Biswell*, 406 U. S. 311 (1972) to urge a contrary result. The proposed stay will not affect the respondent in any way, and there are no equities weighing against it which may be asserted by persons actually before the Court. In such a situation, where the decision of the District Court has invalidated a part of an Act of Congress. I think that the Act of Congress, presumptively constitutional as are all such Acts, should remain in effect pending a final decision on the merits by this Court.

The Government's application for a stay is accordingly granted pending the timely filing of a notice of appeal and jurisdictional statement, and the disposition of the same by this Court.

SUPREME COURT OF THE UNITED STATES

No. A-600

RAY MARSHALL, SECRETARY OF LABOR, ET AL.,
APPELLANTS

v.

BARLOW'S, INC.

ORDER

UPON FURTHER CONSIDERATION of the application of the Acting Solicitor General of the United States and together with the response filed thereto,

IT IS ORDERED that the judgment of the United States District Court for the District of Idaho entered December 30, 1976 in case Civil No. 1-76-3 be, and the same is hereby, stayed, except as it applies to appellee Barlow's, Inc., pending the timely docketing of an appeal in the above-entitled case. Should such an appeal be so timely docketed, this order is to continue pending this Court's action on the jurisdictional statement. If the appeal is dismissed or the judgment of the United States District Court is affirmed, this order is to terminate automatically. In the event that jurisdiction is noted or postponed, or the judgment of the United States District Court is summarily vacated, this order is to remain in effect pending the sending down of the judgment of this Court.

/s/ William H. Rehnquist
Associate Justice of the
Supreme Court of the
United States

Dated this 3rd day of February, 1977.

A true copy MICHAEL RODAK, JR.
Test:Clerk of the Supreme Court of the
United States

By /s/ Francis J. Lorson

SUPREME COURT OF THE UNITED STATES

No. 76-1143

RAY MARSHALL, SECRETARY OF LABOR, ET AL.,
APPELLANTS

v.

BARLOW'S, INC.

APPEAL from the United States District Court for the
District of Idaho.

The statement of jurisdiction in this case having been
submitted and considered by the Court, probable jurisdic-
tion is noted.

April 18, 1977